(27,067)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 981.

THE THAMES TOWBOAT COMPANY, APPELLANT,

vs.

THE SCHOONER "FRANCIS McDONALD," HER TACKLE, &c.; ALBERT D. CUMMINS, CLAIMANT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., U.S.A. 5-6-68

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of The Thames Towboat Company against the Schooner Francis McDonald," her tackle, etc. in a cause of contract, civil and aritime, alleges as follows, upon information and belief.

First. At all the times hereinafter mentioned the libellant was corporation organized and existing under and pursuant to the ws of the State of Connecticut, and maintained and still maintains shipyard and railways at New London, Connecticut. At all of such mes the libellant was the owner of several steamtugs, including e steamtug "Aries," and was engaged among other things in the wage of vessels in the waters of the Atlantic Coast, including the aters adjacent to New York City and of Long Island Sound.

Second. During the months of October, November and Decemer, 1917, the libellant at the request of the owners of the schooner Francis McDonald" furnished certain supplies and made certain pairs to said schooner at New London, Connecticut, the fair and reasonable value of which amounted to $8,574.95.

In the month of December 1917, the libellant at the request of the owners of the schooner "Francis McDonald," means of its said tug "Aries," towed said schooner from New ondon, Connecticut, to New York. The fair and reasonable value such services was $350.00.

Payment of said sums has been demanded by the libellant but part thereof has been paid except the sum of $3,500.00, and ere is now due and owing to the libellant from said schooner the m of $5,424.95.

Third. Said schooner "Francis McDonald" is now within this istrict and within the jurisdiction of this court.

Fourth. All and singular the premises are true and within the dmiralty and maritime jurisdiction of the United States and of this onorable Court.

Wherefore libellant prays that process in due form of law acrding to the course and practice of this court in causes of admiralty d maritime jurisdiction may issue against the said schooner "Fran McDonald," her tackle, etc. and that all persons claiming any terest therein may be cited to appear and answer all and singular e matters aforesaid, and that this Honorable Court will decree to your libellant the payment of its damages aforesaid, with interest and costs, and that the said schooner "Francis McDonald," her tackle, etc. may be condemned and sold to pay e same, and that your libellant may have such other and further lief in the premises as it may be entitled to receive.

PARK & MATTISON,
Proctors for Libellant,
No. 79 Wall Street, New York City.

4 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry E. Mattison, being duly sworn, deposes and says, that he is a member of the firm of Park & Mattison, proctors for the libellant herein. That he has read the foregoing libel, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief. That the reason this verification is not made by the libellant is that the libellant is a foreign corporation and none of its officers is now within this District or within one hundred miles of the place of trial.

HENRY E. MATTISON.

Sworn to before me this 14th day of February, 1918.

JUEL A. SHELLEY,
Notary Public,
New York County.

[SEAL.]

5 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Albert D. Cummins and Francis J. McDonald to the libel and complaint of The Thames Towboat Company against the schooner "Francis J. McDonald," sued as "Francis McDonald," her tackle, etc. in an alleged cause of contract, respectfully shows to the court:

First. Claimants have no knowledge or information sufficient to form a belief respecting the truth of the allegations contained in the First article of the libel and leave libellant to introduce its proofs thereof.

Second. Claimants answering the Second article of the libel, admit that in the month of December, 1917, the libellant with the steamtug "Aries" at the request of the claimants, towed the unfinished schooner "Francis J. McDonald" from New London, in the State of Connecticut, to the City of New York, for the sum of Three hundred and fifty dollars, which amount was paid to the libellant in full; that they have further paid to the libellant the sum of Thirty-five hundred dollars and deny each and every other allegation in said article except such as are hereinafter specifically admitted.

6 Third. Claimants admit the allegations of the Third article of the libel.

Fourth. Claimants deny each and every allegation contained in the Fourth article of the libel.

Claimants further answering said libel respectfully show:

Fifth. In or about the year 1917, claimants entered into a contract with the Robert Palmer Shipbuilding & Marine Railways Co. of Groton, Connecticut, to build for them a certain schooner since named the "Francis J. McDonald." Thereafter the said contractor

and its successors, the Groton Iron Works, under and pursuant to the provisions of the contract, undertook to build the vessel in question. Before she was finished, on account of existing conditions, and the work in its shipyard in progress for the United States Government, the builder found that it was not in position to properly carry on the contract to completion, and it was agreed between it and the claimants, among other things, that the claimants would finish the vessel elsewhere; he allowed a certain amount of money off the contract price, together with the materials which had been assembled to finish the schooner.

Sixth. Thereafter claimants entered into an agreement with The Thames Towboat Company whereby the latter agreed to complete the building of the schooner, using for that purpose so far as it could the said assembled materials. In conformity with said agreement, the unfinished vessel was taken to libellant's yard at New London, and Libellant under the agreement with claimants, proceeded with the work of finishing the vessel. After it had been at work upon her under said contract, during the months of October, November and December, 1917, and before said contract had been completed or substantially completed, libellant for its own purposes, refused to complete the contract with claimants and also refused to do any further work upon the vessel. By reason of said refusal, claimants were compelled to secure the services of another ship carpenter to finish the vessel and to that end entered into an agreement with Tietjen & Lang Dry Dock Co., of Hoboken, N. J. to carry on the building of said vessel to its completion and had her towed in her then condition to the yards of the latter company, where her construction was finally completed.

Seventh. During the time when the libellant was working upon the vessel under the contract with claimants as aforesaid, the said claimants performed all the conditions thereof on their part to be performed and paid to the libellant from time to time on account the sum of Thirty-five hundred ($3,500) dollars, and as libellant refused to complete its said contract and to do any further work upon the vessel, it has no claim against the claimants or the said vessel, and claimants are not indebted to the libellant in any amount.

Eighth. By reason of the refusal of the libellant to complete its contract with the claimants as aforesaid, the latter have been put to large expense in the increased cost of labor and materials; costs of towage; delay in the detention and loss of use of said vessel; and in other respects in the sum of Two thousand ($2,000.00) Dollars, which they hereby offset as a counter-claim against any demand which libellant may assert.

Ninth. After the uncompleted vessel had been removed from libellant's yard as aforesaid, it demanded from claimants the sum of Eighty-five hundred seventy-four 95/100 ($8,574.95) Dollars for work alleged to have been done and materials furnished in the construction of said vessel. Said bill is not a reasonable, fair and true account, but is unjust and untrue in that it grossly exaggerates the

amount of labor rendered and materials furnished; includes and charges for more labor and material than were actually rendered and furnished as aforesaid; the charges for the same are ex-
9 cessive and there is nothing due and owing to libellant from claimants or their said schooner.

Tenth. The contract between libellant and claimants have reference solely to the vessel in the course of construction, is not a maritime contract. The claim if any of libellant for work done and material furnished to said uncompleted vessel is not a maritime claim and libellant's claim if any does not constitute a maritime lien upon said schooner.

Eleventh. All and singular the premises are true.

Wherefore claimants pray that said libel may be dismissed with costs; and that they may have such other and further relief in the premises as may be just.

ALBERT D. CUMMINS.

Sworn to before me this 26th day of June, 1918.

HARLAN E. GOODELL,
Notary Public, County of Philadelphia,
State of Pennsylvania.

[SEAL.] ALEXANDER & ASH,
Proctors for Claimants.

10 United States District Court, Southern District of New York.

THAMES TOWBOAT COMPANY

against

THE SCHOONER FRANCIS MCDONALD.

Before Hon. C. M. Hough, C. J.

NEW YORK, 19 February, 1919.

Appearances:

Messrs. Park & Mattison (Mr. Park) for libelant.
Messrs. Alexander & Ash (Mr. Alexander) for claimant.

The claims of the libel and answer are stated.

11 *Testimony for Libelant.*

LAWRENCE E. CHAPPELL, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Park:

Q. What is your occupation?
A. Superintendent of the Thames Towboat Company.

Q. How long have you been engaged in ship building?
A. 18 years.
Q. Located in New London?
A. Yes sir.
Q. In 1917, in the fall of that year, did you do any work upon the Francis McDonald?
A. Yes.
Q. State the circumstances under which you undertook to do the work, and state what the contract was?
A. There was no contract. A gentleman came to our yard, representing the schooner Francis McDonald, and asked me to do some work on her, and I told him we were rushed to death with government work, and were practically under contract with the Navy Department to do their work for repairs to any vessel owned or operated by the United States Government, and I advised them to take the vessel and tow her to New York if they were in a hurry to get her done; and they seemed anxious for us to do the work, and I finally told them to bring the vessel there and I would do the best I could, and to bring their own men with them——

Q. Did you agree how many men you would furnish for the work?

A. No sir.

Q. What was the character of the work you did there?
A. Oh, it was finishing up this vessel. She was with her masts and wanted the forecastle deck forward, and the forward house and to have the windlass installed, and putting on the hawsepipes and painting.

By the Court:

Q. Did you see the vessel before work was begun upon her, in your yard?
A. I never saw the vessel till she came to my yard.
Q. But before work was done upon her in your yard you saw the vessel?
A. Yes sir, I was on board of the vessel as soon as she came there.
Q. What condition was she in?
A. She looked as any new vessel would look. She had been launched, and the masts were in; the rigging was not set up, and the hawsepipes were not up.
Q. She floated?
A. Yes sir.
Q. But she was not fit to go to sea?
A. Oh no; not under her own sail, no sir.

By Mr. Park:

Q. Did you make any arrangement to haul her out on your ways?
A. No, I told them I would try to haul her if they would give me a chance.
Q. Were all the ways under the charge of the government?

A. Yes sir; we were hauling some of our own vessels to New
13 York.

Q. You sent your own vessels to New York?

A. Yes.

Q. How long was she on the dock?

A. She was on the dock from October 27th till December 12th.

Q. Under what circumstances did she go away?

Q. She went away under tow of one of our tugboats, to New York.

Q. Was she completed, or not?

A. No sir, she was not quite completed.

Q. Why did she go away? Why didn't you finish the work at your yard?

A. The representative told me that she had got to come to New York, and as I understood, he entered on a charter, and that he could not let her wait any longer. He would have to go to New York and finish the work where he could get it done.

Q. Were these bills rendered as the work progressed, and the material was furnished, right along, to A. D. Cummins & Company of Philadelphia?

A. Yes.

Q. Were they represented to be the owners of the boat?

A. That is all I knew of them.

Q. When were these bills rendered?

A. The first of each month.

Q. Are these copies of the bills that you rendered to the owner of the boat (handing papers to witness)?

A. Yes sir.

Mr. Alexander: I don't know whether these bills were ren-
14 dered or not.

Mr. Park: Then I offer the bills in evidence.

Objected to.

By the Court:

Q. Do you know that the bills were sent?

A. Yes.

By Mr. Park:

Q. Are the prices charged for the labor and material furnished there, reasonable or not?

Mr. Alexander: Objected to.

The Court: I do not think I will go into that question. I will only take up the question of liability. I will accept the bills as having been rendered to the persons who Mr. Chappell then regarded as the owners of the boat.

The bills are marked Exhibit 1.

Incorporation is admitted.

Cross-examined by Mr. Alexander:

Q. With whom did you have the conversation with reference to
rking on this boat?
A. The original conversation?
Q. Yes.
A. Three gentlemen, as I remember, came into my yard.
Q. Mr. Cummins was one of them?
A. Yes.
Q. Captain Thompson was another?
A. I can't remember whether he came first, the first day, or whether he came in later.

Redirect examination by Mr. Park:

Q. Who represented himself as the owner of the boat?
A. Mr. Cummins.
Q. These bills have not been paid?
A. No sir.

GEORGE C. WOODWORTH, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Park:

Q. You live where?
A. New London, Connecticut.
Q. Bookkeeper for the Thames Towboat Company?
A. Yes.
Q. Did you hear any conversation between the representatives of
schooner McDonald and Mr. Lawrence E. Chappell, your super-
ndent, when they came to the yard about work on this boat?
A. I did.
Q. State what was said between the parties.
A. Mr. Cummins and two other gentlemen came into the office
d talked with Mr. Chappell, the superintendent of the yard, about
nging the Francis J. McDonald from Noank, Connecticut, to
w London, to finish construction work, for new construction work,
account of the yard being taken over by the government. Mr.
ppell told these gentlemen that he really thought what would be
t for them to do would be to take the schooner to New York, as we
d a government repair contract, No. 290, and at that time we had
ubmarine chasers in the yard and 6 other government boats and
d only one drydock operating, and he explained to him that the
nce would be that it would be impossible to haul the schooner out unless the government gave them the opportunity in between some government boats, as of course all government work came ahead of anything of a private nature.
The gentlemen talked with Mr. Chappell, and they thought they
ld bring the boat to New London, as it was much nearer, and
y thought probably they could get the work done better and
aper. And finally Mr. Chappell told them that if they brought

the boat he would do the best he could, but he couldn't guarante them any number of men, or any time, for finishing the work.

—. Do you know whether you were able to haul her out at you yard or not?

A. No sir, we were not able to haul her out.

Cross-examined by Mr. Alexander:

Q. Where did that conversation take place?

A. In the office of the Thames Towboat Company.

Q. Are you sure of that?

A. Positive.

Q. Do you recognize anybody in court here who took part i that conversation?

A. Yes; Mr. Cummins.

Q. Anybody else?

A. No sir. There were two other gentlemen who are not presen here.

Q. Was there anything said about this vessel being in the cours of construction?

A. They explained that the schooner was not finished; and M Chappell told them that if they could bring any men from the othe yard in the way of caulkers or joiners or carpenters an

18 riggers, they were at liberty to do so.

Q. Do you recollect anything being said about the materia to finish her being on the boat, and that would come across wit her, and that could be used in finishing up the boat?

A. There was some material that came with the schooner, yes si

Q. Do you recollect Mr. Cummins saying anything about th vessel having material enough to complete her, and that was to h used, as far as it would go, by the Thames Towboat Company?

A. No sir, I do not.

Q. You don't recollect that?

A. No sir.

Libelant rests.

19 *Testimony for Claimant.*

ALBERT D. CUMMINS, being duly sworn and examined as a wi ness for the claimant, testifies:

By Mr. Alexander:

Q. You are one of the claimants in this action?

A. Yes.

Q. And one of the builders of the schooner Francis J. McDonald

A. Yes.

Q. Do you recollect going to the Thames Towboat Company t see about finishing this boat?

A. Yes.

Q. Who was with you at the time?

A. Mr. McDonald and Captain Thompson.

Q. Whom did you see in behalf of the Thames Towboat Company?

A. We went in the office to see about it, but they told us that we would have to see Mr. Chappell, the one who testified here. I don't know his first name.

By the Court:

Q. Lawrence Chappell?

A. Lawrence Chappell. We met him in the yard just about the time we had given him up and got in the automobile to go away, and he stood there at the automobile, and we had our conversation with Mr. Chappell.

Q. That conversation was not in the office at all?

A. No sir.

Q. You saw the last witness here?

A. Yes.

Q. Was he present at the time of that conversation?

20 A. No sir.

Q. Just tell us what took place between yourself and Mr. Chappell?

A. We had a general talk as to the conditions that we were up against about getting the vessel finished, and he seemed to understand all about that.

Q. Tell us what was said?

A. Well, we told him that they had refused, or could not complete the vessel, and we had to take her somewhere else to complete her. He said that they had quite a lot of work and that they were not accepting any outside work. We explained that we would like to do it there, particularly as she was not in shape to move any further then. She had no steering gear or anchors and chains, and her rigging was just hanging down the side of the mast and we could move her that far but no further. There was an awful sight of work before we did that. And he said "You bring her over and I will give you all the men I can, and hurry up as quick as I can. I don't know when I can haul her on the dock, but I can work her in between some of the government jobs."

Q. What was said about his finishing up the work?

A. There was no limit put as to finishing her up, but the general impression was that he would go ahead and finish the work.

Mr. Park: Objected to. No, I will withdraw the objection.

Q. Was the work finished by the Thames Towboat Com-

21 pany.

A. No sir.

Q. What did you finally have to do, and tell us why?

A. We had to put a lot of caulking in the ceiling, which made it necessary to do that work while she was on the drydock; and he refused to haul her out, and said he wouldn't, and we would have to take her away to do that, so we brought her to Tietjen & Lang's yard to do that work.

By the Court:

Q. Was the vessel, as matter of fact, except doubtless for the comparatively small things that are always overlooked, finishe at Tietjen & Lang's place, except for fastening or caulking th ceiling?

A. No; not by any means. We worked on her for 30 or 40 day completing her.

Q. Well, that is not very long. What other substantial job wa there besides the ceiling?

A. Installing most of her steam gear in the engine room, an Captain Thompson can tell you more about that than I can.

By Mr. Alexander:

Q. How much did it cost you in New York, here?

Objected to as immaterial.
Objection sustained.

Q. How about her chain plates? Were they on when she wen across to the Thames Towboat Company?

A. I think they were. I am not sure about that.

Q. How about her topmasts?

A. Her topmasts were not in.

22 Q. Jibboom? A. Jibboom? No.

Q. Head rigging? A. No head rigging.

Q. Her engines? A. No engines were installed, and the boile was on deck.

Q. Hatches? A. No hatches.

By the Court:

Q. What was the engine for? Hoisting sail, or cargo, or both?

A. Both. Windlass and engine.

Q. Nothing else? She was not an auxiliary?

A. No.

By Mr. Alexander:

Q. There was something said about bills having been rendered monthly. Did you get bills monthly from the Thames Towboat Company? A. No.

Q. When was the first you knew about the amount of them?

A. After the vessel had been taken away.

Q. That was after she was in New York?

A. Yes; they asked us for a payment on account, while the work was in the course of construction; some $3,500, I think.

Cross-examined by Mr. Park:

Q. You were the owner of the boat at the time?

A. No.

Q. Whom did you represent? A. We had not received the proper certificate from the builder yet.

Q. When did it come?

A. We had not received the proper certificate yet; we were contractors for the purchase of the vessel when she was built.

23 Q. You paid the Thames Company? A. Yes sir.

Q. And you made the agreement with the Thames Towboat Company? A. Yes sir.

By the Court:

Q. You made the agreement with the people who started her building?

A. Yes sir.

24 S. C. THOMPSON, being duly sworn and examined as a witness for the claimant, testifies:

By Mr. Alexander:

Q. What is your business?

A. Well, I am what you would call a retired sea captain; a master mariner.

Q. Did you have anything to do with the construction of the schooner Francis J. McDonald?

A. Yes sir, I superintended the building of her.

Q. You were superintendent of the vessel while she was being constructed at the Groton Iron Works?

A. Yes. I was looking after Mr. Cummins's interests.

Q. You had charge of her from the beginning?

A. Yes sir, of Mr. Cummins's interests.

Q. Do you recollect the bringing of the vessel across from there to Chappell's?

A. Yes.

Q. Who was present at the time the arrangement was made with reference to the completion of the work at the Thames Towboat Company's yard?

A. Mr. Cummins and Mr. McDonald and myself.

Q. With whom did you communicate on behalf of the Thames Towboat Company with reference to going on with the completion of the work?

A. Mr. Chappell.

Q. Tell us who was present at the conversation with Mr. Chappell?

A. Mr. McDonald and Mr. Cummins and myself.

Q. Where did this conversation take place?

A. In the ship yard.

25 Q. Was Chappell's bookkeeper present? A. No sir; not at that time.

Q. Tell us what took place between you four gentlemen? What was said?

A. We had been in the office of the Company, and they said there that we would have to see Mr. Chappell, and we looked around for him, and were about to leave the yard when we met him at the entrance to the yard, and we explained the matter, and he said "Bring the vessel over and we will try to finish her up."

Q. What was the distance between the place where the vessel was lying and New London? A. It took us about 4 hours to come over.

Q. In what condition was the vessel then?

A. She was not a vessel.

Q. In what respect?

A. In several respects. She wasn't fit to go anywhere.

By the Court:

Q. She had come off the ways?

A. She was just simply off the ways.

Q. And she was afloat?

A. Yes.

Q. And she was brought on her own bottom to New London?

A. Yes sir.

By Mr. Alexander:

Q. So far as you can remember what did you require to complete her?

A. She had no steering gear; her rudder was shipped; that was all. She had no chain plates on; they were all laying on deck, and the bolts and beams and gaff were all laying on deck; the decking
26 was on deck to build the forward house with; that was not built; the hawsepipes were not in, they were on deck. The anchors and chains were on deck. The decks had never been caulked, and there was about, I should say, 10 days' caulking outside that had not been finished.

Q. How about her masts?

A. The lower mast was simply stepped. That was all. It was temporarily wedged with some oak wedges.

Q. What about her rigging?

A. Well, the lower rigging of course was over the *lead* of the lower mast; but all the rest was down in the hold.

Q. You say "over the head of the lower mast." What was it attached to below?

A. Just hung down, straight down the mast.

Q. So the masts were simply standing on their steps?

A. Yes.

Q. And had to be wedged up in order to keep them firmer?

A. Yes; and the chain plates had to be put on the vessel and the rigging attached.

Q. Was that vessel in any condition to carry on any service at that time?

A. Oh no sir.

Cross-examined by Mr. Park:

Q. All this work was done while she was overboard?
A. She was laying alongside of Mr. Chappell's dock.

—. —.

27 A. Yes.

Q. She was floating?
A. Yes, she was floating.
Q. There was plenty of water there?
A. There was plenty of water there.

Claimant rests.

Testimony closed.

28 The Court: I will hold now that the only two questions in this case are:

First. Whether there is any lien; and

Second. What amount is the reasonable quantum in dollars and cents of said lien.

I will also hold that the defence set forth or indicated in the answer, that there could be no recovery by reason of non-performance of the entire contract, is not supported by the evidence, and is hereby over-ruled.

Now you may argue the question of lien.

Counsel summed up the case.

29 District Court of the United States, Southern District of New York.

THAMES TOWBOAT COMPANY, Libellant,

against

THE SCHOONER "FRANCIS MCDONALD."

Memorandum.

From the tenor of the answer, and failure to offer any evidence in regard to the towage service alleged in the libel, I infer it to be true that libellants have been paid for towing the schooner, or at any rate the hull of the schooner, from New London to New York. The question remains whether there can be a maritime lien for the labor and materials expended by libellants upon the res which they have libelled. If the matter were a new question, or one upon which I felt at liberty to deduce results from what I regard as the principles of maritime law, I should give to libellants a decree.

But there can be no doubt that mutatis mutandis the lan-
30 guage of Brown, D. J. in The Paradox, 61 F. R. at 861, is applicable. He there said: "The evidence leaves no doubt that all the machinery was contracted for and supplied for the purpose of completing the construction of the vessel as an experimental yacht in accordance with the original design."

So here. All the work done and all the material furnished by this libellant was for the purpose of completing the construction of the schooner McDonald so that she would be as a schooner and not as a mere hulk able to plough the sea.

So far as I can discover, all the cases on this subject have been collated either in 26 Cyc., p. 763, or in The Dredge A, 217 F. R., 617. With few exceptions they all rest upon the basis that construction or building means fabrication for the originally designed purpose; so that everyone who contributes (at least knowingly) to such intended fabrication is a builder and not a furnisher of supplies, material or labor.

On theory I do not agree with this reasoning; it appears to me that the moment the owners of the hulk or hull took her away from the original contractors and tendered her floating for completion and equipment to another person, that by such tender they
31 impliedly offered the floating res as a subject of lien.

It is beyond all question that for some purpose the McDonald was a ship when she arrived at New London. She was plainly a ship for the purpose of being answerable through the enforcement of a lien for any maritime tort she wrought, and with equal plain-ess was she the subject of maritime lien for the contractual service of towing her wherever her owners desired her to go; and the list might be greatly extended.

To me it is illogical that she can be the subject of maritime lien for so many purposes and yet not so liable for the most important service of all, namely the completion of that which the original contractors had failed in.

But it is difficult to distinguish this case, or that of The Paradox, from the earlier cases in the Supreme Court, and it is impossible to suggest any substantial difference between the present litigation and Judge Brown's decision in The Paradox, which in my judgment is binding upon me.

As for the language in Tucker v. Alexandroff, 183 U. S. 424, it must be taken in connection with the sentence on page 439, viz: "Inasmuch as the Variag had been launched and was lying in the stream at the time of Alexandroff's desertion, we think that
32 she was a ship within the meaning of the treaty." That was the only point that was decided in the Tucker case; all the rest is obiter unless read in connection with and understood by the point of decision.

Therefore, again to quote from The Paradox, "I much regret the necessity of this conclusion in the present case, but it seems unavoidable upon the authorities;" and therefore I dismiss the libel, without costs.

Feb. 21, 1919.

33 At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the U. S. Court and Post Office Building, Borough of Manhattan, City of New York, on the 3rd day of March, 1919.

Present: Hon. Charles M. Hough, Circuit Judge.

THAMES TOWBOAT COMPANY, Libellant,

against

SCHOONER "FRANCIS J. McDONALD," HER TACKLE, etc.

The above entitled suit having been heard on the pleadings and proofs and argued and submitted by the proctors for the respective parties, and due deliberation having been had in the premises; Now, on motion of Alexander & Ash, proctors for claimant it is

Ordered, adjudged and decreed that the libel herein be
34 and the same hereby is dismissed without costs, for lack of jurisdiction.

C. M. HOUGH, *C. J.*

35 United States District Court, Southern District of New York.

THE THAMES TOWBOAT COMPANY, Libellant-Appellant,

against

THE SCHOONER "FRANCIS McDONALD," HER TACKLE, etc.; ALBERT D. CUMMINS, Claimant-Appellee.

Notice of Appeal.

SIRS: Please take notice that the libellant-appellant above named hereby appeals to the Supreme Court of the United States from the final decree of this court, dated the 3rd day of March, 1919, and entered on the 5th day of March, 1919, in the office of the Clerk of this Court, and from each and every part of said final decree.

Yours, etc.

PARK & MATTISON,
Proctors for Libellant-Appellant,
No. 79 Wall Street, New York, N. Y.

Dated, New York, March 28th, 1919.

To Messrs. Alexander & Ash, Proctors for Claimant-Appellee; Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court for the Southern District of New York.

36 United States District Court, Southern District of New York.

THAMES TOWBOAT COMPANY, Libellant-Appellant,

against

THE SCHOONER "FRANCIS McDONALD," HER TACKLE, etc.; ALBERT D. CUMMINS, Claimant-Appellee.

Assignment of Errors.

Now comes The Thames Towboat Company, the libellant-appellant, by Park & Mattison, its proctors, and having appealed from the final decree of the District Court of the United States for the Southern District of New York, entered in said Court on the 5th day of March, 1919, whereby the said libel was dismissed, to the Supreme Court of the United States, in the above entitled cause of contract, civil and maritime, assigns the following as the errors on which it intends to rely on said appeal:

The District Court of the United States, for the Southern District of New York, erred:

First. In holding that the said Court had no jurisdiction to entertain the said libel and to award the petitioner the relief therein prayed for.

Second. In holding that the allegations of the said libel and all the proceedings had thereunder did not disclose a cause of
37 action of admiralty and maritime jurisdiction.

Third. In that said Court erred in entering a decree dismissing the said libel.

Dated, New York, March 28th, 1919.

PARK & MATTISON,
Proctors for Libellant-Appellant.

38 United States District Court, Southern District of New York.

THE THAMES TOWBOAT COMPANY, Libellant-Appellant,

against

THE SCHOONER "FRANCIS McDONALD," HER TACKLE, etc.; ALBERT D. CUMMINS, Claimant-Appellee.

Petition for Allowance of Appeal, and Order of Allowance.

The above named libellant-Appellant, The Thames Towboat Company, conceiving itself aggrieved by the final decree entered herein on the 5th day of March, 1919, whereby the libel was dismissed for want of jurisdiction, and having filed with the Clerk of the said District Court an Assignment of Errors, does hereby appeal from

id final decree to the Supreme Court of the United States for the asons specified in said Assignment of Errors, and it prays that this, appeal, may be allowed, and that the question of the jurisdiction the above entitled District Court to entertain the said libel and award the relief therein sought, be certified to the Supreme Court the United States, and that a transcript of the record and proceedgs and papers upon which said final decree was made, duly auenticated, may be sent to the Supreme Court of the United States.

Dated, New York, March 28, 1919.

PARK & MATTISON,
Proctors for Libellant-Appellant,
No. 79 Wall Street, New York, N. Y.

New York, March 29th, 1919.

And now, to-wit: On March 29th, 1919, it is

Ordered that the appeal be allowed as prayed for.

C. M. HOUGH,
United States Circuit Judge.

United States District Court, Southern District of New York.

THE THAMES TOWBOAT COMPANY, Libellant-Appellant,

against

HE SCHOONER "FRANCIS MCDONALD," HER TACKLE, etc.; ALBERT D. CUMMINS, Claimant-Appellee.

NITED STATES OF AMERICA, ss:

Albert D. Cummins, Claimant Above Named, and to Messrs. Alexander & Ash, Proctors for said Claimant:

You are hereby cited and admonished to be and appear at the upreme Court of the United States, to be holden at Washington the 26th day of April 1919, pursuant to an appeal filed in the fice of the Clerk of the District Court of the United States, for the uthern District of New York, wherein The Thames Towboat Comny is appellant, and Albert D. Cummins, the claimant above amed, is appellee, to show cause, if any there be, why the decree appealed from should not be corrected and reversed, and speedy stice should not be done to the parties in that behalf.

Witness, the Hon. Edward D. White, Chief Justice of the United States, this 28th day of March in the year of our Lord One thousand nine hundred and nineteen, and of the Independence of the United States the 143rd.

CHAS. M. HOUGH,
United States Circuit Judge.

42 United States District Court, Southern District of New Yor

THE THAMES TOWBOAT COMPANY, Libellant-Appellant,

against

SCHOONER "FRANCIS McDONALD," Her Tackle, etc.; ALBERT D. CUMMINS, Claimant-Appellee.

Certificate as to Question of Jurisdiction.

I, Charles M. Hough, Circuit Judge, holding the United Stat District Court, for the Southern District of New York, do hereb certify that the libel of The Thames Towboat Company against th schooner "Francis McDonald", her tackle, etc. was dismissed by m for the reason that the evidence produced upon the trial of sai cause did not set forth or disclose any cause of action or matter admiralty or maritime jurisdiction; and

I do certify that the libel herein was dismissed by me and fin decree given for the claimant, Albert D. Cummins, solely because deemed that the United States District Court, sitting as a Court Admiralty, had no jurisdiction to entertain or enforce the cau of action or matters set up in the said libel upon the evidence pr duced upon the trial of said cause.

Copies of the libel, answer, evidence, opinion of the Ci

43 cuit Judge holding the District Court and final decree a hereto attached and made a part of this certificate.

This certificate is made in conformity with Section 238 of th Act entitled: "An Act to modify, revise and amend the laws rela ing to the judiciary", approved March 3, 1911, Chapter 231, amended.

Dated, New York, March 29th, 1919.

CHAS. M. HOUGH,
United States Circuit Judge.

44 [Endorsed:] 65-85. U. S. District Court, Southern Di trict of New York. The Thames Towboat Company, Libel lant-Appellant, vs. Schooner "Francis McDonald", Her Tackle, etc Albert D. Cummins, Claimant-Appellee. (Original.) Certificate to Question of Jurisdiction. Park & Mattison, Proctors for Appel lant. 79 Wall Street, Borough of Manhattan, New York City. U S. District Court, S. D. of N. Y. Filed Mar. 29, 1919.

45 United States District Court, Southern District of New York.

THE THAMES TOWBOAT COMPANY, Libellant-Appellant,

against

SCHOONER "FRANCIS McDONALD", Her Tackle, etc.

Stipulation on Appeal Record.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, March 31st, 1919.

PARK & MATTISON,
Proctors for Libellant-Appellant.
ALEXANDER & ASH,
Proctors for Claimant-Appellee.

46 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE THAMES TOWBOAT COMPANY, Libellant,

vs.

THE SCHOONER FRANCIS J. McDONALD, Her Tackle, etc.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 8th day of April in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-third.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, Jr.,
Clerk.

Endorsed on cover: File No. 27,067. S. New York D. C. U. S. Term No. 981. The Thames Towboat Company, appellant, vs. The Schooner "Francis McDonald," Her Tackle, &c., Albert D. Cummins, Claimant. Filed April 15th, 1919. File No. 27,067.

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OF THE UNITED STATES.

THE THAMES TOWBOAT COMPANY, Libellant-Appellant, against The Schooner "FRANCIS MCDONALD" her tackle, etc. ALBERT D. CUMMINS, Claimant.	October Term 1919. No. 353

BRIEF FOR LIBELLANT-APPELLANT.

Statement of Case.

This case is an appeal from a final decree of the District Court of the United States, for the Southern District of New York, entered on the 31st day of March, 1919, dismissing the libel for lack of jurisdiction.

The libel was *in rem* against the schooner "Francis McDonald", her tackle, etc. in a cause of contract, civil and maritime, alleging that during the months of October, November and December, 1917, the libellant at the request of the owners of the schooner "Francis McDonald"

furnished certain supplies and made certain repairs to said schooner at New London, Connecticut, the fair and reasonable value of which amounted to $8574.95. That payment of said sum had been demanded of the claimant but that no part thereof had been paid except the sum of $3500.00 and that there was due and owing to the libellant from the said schooner the sum of $5,424.95.

The libel further alleged that the said schooner "Francis McDonald" was at the time within the jurisdiction of the United States District Court, for the Southern District of New York.

Record, p. 1, fols. 1, 2.

The answer alleged that in or about the year 1917 the claimants of the schooner entered into a contract with the Robert Palmer Ship-building & Marine Railway Company of Groton Connecticut to build for them a certain schooner. Thereafter the said contractor and its successor, the Groton Iron Works, under and pursuant to the contract, undertook to build the vessel in question. Before she was completed, on account of existing conditions (war conditions) and the work in its shipyard for the United States Government, the builder found it was not in position to carry on the contract to completion, and it was agreed between it and the claimants of the schooner that the claimants would finish the vessel elsewhere; that thereafter the claimants entered into an agreement with the libellant to complete the building of the schooner at its yard at New London; that the contract between libellant and the claimant had reference solely to the vessel in the course of construction and was not a maritime contract.

Record, pp. 2, 3, 4.
Judge Hough, Circuit Judge, sitting in the District Court in Admiralty, held:

"All the work done and all the material "furnished by this libellant was for the pur- "pose of completing the construction of the "schooner 'McDonald'."

Record, p. 14, fol. 30.
Judge Hough further held:

"It is beyond all question that for some "purposes the McDonald was a ship when "she arrived at New London. She was "plainly a ship for the purpose of being "answerable through the enforcement of a "lien for any maritime tort she wrought, and "with equal plainness was she the subject "of maritime lien for the contractual serv- "ives of towing her wherever her owners de- "sired her to go; and the list might be "greately extended.

"To me it is illogical that she could be "the subject of maritime lien for so many "purposes, and yet not so liable for the most "important service of all, namely, the com- "pletion of that which the original contrac- "tors had failed in.

"But it is difficult to distinguish this case, "or that of The Paradox, from the earlier "cases in the Supreme Court, and it is im- "possible to suggest any substantial differ- ence between the present litigation and "Judge Brown's decision in The Paradox "which, in my judgment, is binding upon me.

"As for the language in *Tucker* v. *Alex- "androff*, 183 United States, 424, it must be

"taken in connection with the sentence on "page 439, viz; 'inasmuch as the Variag "had been launched and was lying in the "stream at the time of Alexandroff's deser- "tion we think that she was a ship within "the meaning of the treaty.' That was the "only point that was decided in the Tucker "case; all the rest is obiter unless read in "connection with and understood by the "point of decision.

"Therefore, again to quote from The Para- "dox, 'I much regret the necessity of this "conclusion in the present case but it seems "unavoidable upon the authorities'."

Record, p. 14, fols. 31, 32.

Statement of Facts.

The libellant-appellant, The Thames Towboat Company, is a corporation under the laws of the State of Connecticut, and owns and maintains a shipyard for the construction and repair of vessels at New London, Connecticut. Sometime previous to the furnishing of the material, work and labor by the libellant to the schooner "McDonald" A. G. Cummins & Co. of Philadelphia, Penn., claimants, entered into a contract with the Robert Palmer Ship-building and Marine Railway Company, of Groton, Connecticut, for the construction of the schooner "Francis McDonald"; said company and its successor, the Groton Iron Works, undertook to build the vessel in question. After she was launched the original contractor was unable to complete the vessel on account of pressure of work in their

yard for the United States Government during the war. The schooner had been launched and was water-borne, her masts were in, but she was not at the time completed as a sailing vessel. Arrangements had been made between the builder and the claimants whereby the claimants took the schooner in her then condition in order to completely fit her for sea. In that situation the claimants proceeded to New London to the yard of the libellant, and at the request of the claimants the libellant agreed that if the claimants would bring the schooner to the libellant's yard at New London (which at the time was under Government control) it would do the best it could toward the completion of the vessel. Thereupon the schooner was towed from the yard of the Groton Iron Works, at Groton, Connecticut, to the yard of the libellant, where the materials, work and labor were furnished, as alleged in the libel. At the time the schooner arrived at the yard of the libellant the masts were stepped but the rigging was not set up and the hawse pipes were not up, and other things incidental to the final completion of the schooner had to be done. During all the time of the rendition of the services and the furnishing of materials by the libellant the schooner was at the libellant's yard afloat. On account of the press of Government work, however, it was found impossible to speedily hurry up the work at the libellant's yard and the schooner was towed from the libellant's yard to Tietjen & Lang's Yard, Hoboken, New Jersey, for further work, in tow of one of the tugs of the libellant. The towage claim set forth in the libel was paid.

There are two assignments of error from the decision of the District Court.

FIRST: In holding that the said court had no jurisdiction to entertain the said libel and to award the libellant the relief prayed for.

SECOND: In holding that the allegations of the said libel and all the proceedings had thereunder did not disclose a cause of action of admiralty and maritime jurisdiction.

Record, p. 16, fol. 36.

ARGUMENT.

I.

Admiralty jurisdiction attaches to a contract made between the owners of a vessel and a new party for work, labor and materials furnished to said vessel after the said vessel is launched.

The law is settled that a contract for the construction of a vessel is in its nature non-maritime and is not a subject for admiralty jurisdiction.

Peoples Ferry Company v. *Beers*, 20 How. 393;
Roach v. *Chapman*, 22 How. 129;
Edwards v. *Elliott*, 21 Wall. 532;
The Winnebago, 205 U. S. 354, at p. 363.

There is, however, a broad distinction between contracts made for the construction and building of a vessel and contracts for services to be rendered and materials to be furnished made after the said vessel has been launched and is waterborne. In a large majority of the cases in the District Courts in which it has been held that admiralty jurisdiction does not attach for materials furnished after a vessel was launched the contracts were made before the vessel was *in esse* and before launching.

In the case of *The Paradox*, 61 F. R. 860, cited by the District Judge as one of the controlling authorities relative to admiralty jurisdiction, the original contract for the propelling machinery, installed in the vessel after she was launched, was made before the vessel was launched and before the vessel was *in esse*. The original contractor was succeeded by another company, the libellant in that case. Part of the work was performed by the predecessor of the libellant in that case and its successor carried it on to completion.

Robert D. Benedict, Esq. counsel for the claimant of the *Paradox*, in his brief filed in the United States District Court, Southern District of New York, in distinguishing *The Eliza Ladd* from *The Paradox*, states:

> "In The Eliza Ladd the vessel had been "eight months afloat before the contract set "forth in the libel was made. In the case "at bar the Paradox two days after her "launching went to libellant's yard and found "the engines practically completed, which

"shows that the contract for the engines had "been made long previous to the launching "of the Paradox."

In the case of *The Peoples Ferry Company* v. *Beers, et al, supra*, the contract was made before launching.

In *Roach, et al*, v. *Chapman, et al., supra*, while the opinion of the court does not disclose the time the contract was made, the libel, however, being filed for balance due upon boilers and engines, presumptively the contract was made before the launching of the vessel on account of the length of time necessary to build engines and boilers.

In *Edwards* v. *Elliott, supra*, the contract was made before launching.

In the *Winnebago, supra*, the contract was made before the launching of the steamer.

The distinction between contracts made before and after launching relative to admiralty jurisdiction is well stated by Judge Deady in the case of the *Eliza Ladd*, Federal Cases No. 4364, in which he states:

"At the moment when she leaves the ways, "and her keel strikes the element for which "she was originally designed, that is the "moment of her birth as a ship, and the "occasion when a name is usually bestowed "on her. Thereafter all contracts to equip, "furnish or repair this machine have direct "reference to a vessel in esse, with capacity "for locomotion and transportation on navi-"gable waters and are, therefore, maritime."

This reasoning was subsequently followed by Judge Deady in the case of *The Revenue Cutter*, Fed. Cas. No. 11714, in which he held that a vessel launched and afloat upon the navigable waters is a vessel built and a contract to furnish materials for her equipment is a maritime one. This distinction was recognized and followed by Judge Hanford, Northern District of Washington, in the case of *The Manhattan*, 46 F. R. p. 797, in which he held, at p. 800:

> "After a new ship has been launched, and "embraced by the element upon which she "is intended to float, and been christened, "and become an entity fully capable of be- "ing identified, she is as much a subject of "admiralty and maritime jurisdiction as she "can be at any later period of her history; "and contracts then entered into relating to "her completion, equipment, or employment "are maritime, and cognizable in admiralty."

The leading case in this Court recognizing this distinction is the case of *Tucker* v. *Alexandroff*, 183 U. S. p. 424. Judge Hough in deciding this case in the District Court held in reference to said case that the language therein must be taken in connection with the sentence at p. 439, as follows:

> "Inasmuch as the Variag had been launched "and was lying in the stream at the time "of Alexandroff's desertion, we think she "was a ship within the meaning of the "treaty. That was the actual point that was "decided in the Tucker case; all the rest

"is obiter unless read in connection with and "understood by the point of decision."

Record, p. 14, fol. 32.

Alexandroff was an assistant physician in the Russian Naval Services and was sent from Russia to Philadelphia with other men to take possession of and man the "Variag" then under construction by the firm of Cramp & Sons as a war ship for Russia. After launching and while lying in the stream, still under construction by Cramp & Sons, Alexandroff deserted. Under Article 9, of the treaty between Russia and the United States of America, consuls, vice-consuls and commercial agents were authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. (Supra, bottom of p. 429). The question before the court was, whether the "Variag" at the time of the desertion by Alexandroff was a ship or vessel.

We believe that decision goes further than stated by Judge Hough. Mr. Justice Brown, writing the opinion of the court, states at the bottom of page 437:

> "At the time Alexandroff arrived in Phila-"delphia, the 'Variag' was still upon the "stocks. Whatever be the proper construc-"tion of the word under the treaty, she was "not then a *ship* in the ordinary sense of "the term, but shortly thereafter and long "before Alexandroff deserted, she was "launched, and thereby became a ship in its

"*legal* sense. A ship is born when she is "launched, and lives so long as her identity "is preserved. Prior to her launching she "is a mere cogeries of wood and iron—an "ordinary piece of personal property—as "distinctly a land structure as a house, and "subject only to mechanics' liens created by "state law and enforcible in the state courts. "In the baptism of launching she receives her "name, and from the moment her keel touches "the water she is transformed, and becomes "a subject of admiralty jurisdiction. She ac- "quires a personality of her own; becomes "competent to contract, and is individually "liable for her obligations, upon which she "may sue in the name of her owner, and be "sued in her own name. She is capable, too, "of committing a tort, and is responsible in "damages therefor. She may also become a "*quasi* bankrupt; may be sold for the pay- "ment of her debts, and thereby receive a "complete discharge from all prior liens, "with liberty to begin a new life, contract "further obligations, and perhaps be sub- "jected to a second sale. We have had fre- "quent occasion to notice the distinction be- "tween a vessel before and after she is "launched. In *The Jefferson, People's Ferry "Company* v. *Beers*, 20 How. 393, it was held "that the admiralty jurisdiction did not "extend to cases where a lien was claimed "for work done and materials used in the "construction of a vessel; while the cases "holding that for repairs or alterations, sup- "plies or materials, furnished after she is "launched, suit may be brought in a court of

"admiralty, are too numerous for citation.

"So sharply is the line drawn between a "vessel upon the stocks and a vessel in the "water, that the former can never be made "liable in admiralty, either *in rem* against "herself or *in personam* against her owners, "upon contracts or for torts, while if, in tak- "ing the water during the process of launch- "ing, she escapes from the control of those "about her, shoots across the stream and "injures another vessel, she is liable to a "suit *in rem* for damages." (italics ours).

That case was decided October Term, 1901.

In 1907 the case of *The Winnebago* was decided, by this court, (205 U. S. p. 354). The case was before this court on a writ of error to the judgment of the Supreme Court of Michigan sustaining State liens against the *Winnebago* for construction account. All of the contracts were made before the launching of the *Winnebago*. While four or five small items were furnished after her launching yet the contract for the furnishing of the supplies was made before her launching and those articles were only a small part of the items which were furnished. The record of the case in the Supreme Court of Michigan shows all the materials furnished by complainant except four items were furnished before the date of the launching, March 21, 1903.

Delaney Forge Company v. *The Winnebago*. 142 Michigan Reports, p. 89.

This fact is mentioned because it was claimed in the argument of that case before this court

that the Supreme Court of Michigan erred in allowing certain items for materials furnished the vessel after she was launched, relative to which the decision of this court states:

> "But we agree with the State Court that "these items were really furnished for the "completion of the vessel and were entirely "a part of her original construction." (p. 362).

The contract for the furnishing of these few items was made before the vessel was launched. In the recent case of *The Northern Pacific Steamship Co.* v. *Hall Bros. Company,* 249 U. S. p. 119, the steamship "Yucatan" was furnished repairs and supplies while hauled out upon a marine railway and the point for decision was whether admiralty jurisdiction would attach for services rendered upon a marine railway. In that case this court held:

> "It is settled that a contract for building "a ship or supplying materials for her con-"struction is not a maritime contract.* * *
>
> "'So far from the contract being purely "'maritime, and touching rights and duties "'appertaining to navigation (on the ocean "'or elsewhere) it was a contract made on "'land, to be performed on land.' But the "true basis for the distinction between the "construction and the repair of a ship, for "purposes of the admiralty jurisdiction, is to "be found in the fact that the structure does "not become a ship, in the legal sense, until

"'it is completed and launched. 'A ship is "'born when she is launched, and lives so "'long as her identity is preserved. Prior "'to her launching she is a mere congeries "'of wood and iron—an ordinary piece of "'personal property—as distinctly a land "'structure as a house, and subject to mech-"'anics' liens reacted by state law enforcible "'in the state courts. In the baptism of "'launching she received her name, and from "'the moment her keel touches the water "'she is transformed, and becomes a subject "'of admiralty jurisdiction'. *Tucker* v. *Alex-"androff*, 183 U. S. 424, 438".

The language in that decision differs from the language in the case of *Tucker* v. *Alexandroff* in the addition of the word "completed" in the sentence "until it is completed and launched".

It is common knowledge that a vessel is seldom completed at the time of her launching and yet she may be a subject of admiralty jurisdiction. This is well illustrated in the case of The Winnebago, *supra*. After the Winnebago was documented she entered upon voyages between Lake Superior and Lake Erie engaged in interstate commerce, thereby subjecting herself to the imposition of maritime liens for negligence in her navigation, for collision, for breach of contract for the transportation of merchandise on board; for torts and other liens, and during the time she was engaged upon these trips previous to the commencement of the action under the Michigan statute for the enforcement of said liens on account of her construction, workmen were on board of her engaged in the completion

of the vessel under the original contract. (The Winnebago, p. 356).

We are unaware of any decision of this court since the decision of *Tucker* v. *Alexandroff, supra,* which holds that a vessel when launched does not become a ship in its legal sense. We are unable to find any reported cases where the circumstances and facts are in all respects similar to the present case. When the schooner "McDonald" was launched she became the "Francis McDonald"; her identity was then established; she became a vessel; identified as a vessel; before that time while in course of construction she was not a ship or vessel *in esse.* After the claimants had entered into an agreement with the builders for a settlement of the building account and the claimants took possession of the vessel, and while the vessel was afloat, the contract was made with the libellant not for the construction of the vessel but for the completion of the vessel. There must be a time after the assembly of all the materials which go into the construction of the hull and they are united and the hull is constructed that the *res* becomes a vessel. She might be called a vessel while upon the stocks but she is not subject to admiralty jurisdiction. When launched she is a vessel and the time of her launching should be the time, as was held in *Tucker* v. *Alexandroff, supra,* when admiralty jurisdiction attaches. If a vessel must be completed before admiralty jurisdiction attaches in matters of contract we are confronted with the difficulty of exact knowledge as to the time of completion. This is evident from the facts developed in the case of the Winnebago. The decision in the case of *Tucker* v.

Alexandroff makes certain what might be uncertain and removes doubt as to the time when admiralty jurisdiction begins.

II.

The services rendered and materials furnished by the libellant constituted a lien under the Act of Congress approved June 23, 1910, relating to liens on vessels for repairs, supplies, or other necessaries.

C. 373. 36 Stat. 604.

The Act provides that any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or by a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel.

The record discloses that Albert D. Cummins & Co., the claimants, were contractors for the purchase of the vessel when she was built, and that the said Cummins made the agreement with the libellant.

Record, p. 11, fol. 23.

He also made the agreement with the people who started the building of the "Francis McDonald".

Record, p. 11, fol. 23.

When Cummins proceeded to the yard of the libellant at New London he did not proceed for the purpose of the construction of a ship, the ship had been constructed and was launched, but simply for the purpose of finishing up the odd jobs upon her. She was tendered to the libellant as a vessel and the work of the libellant as a vessel and the work of the libellant upon the "Francis McDonald" was upon a vessel with a name and capable in that stage of her construction to carry cargo if she had been designed to carry cargo without sail. If the contract had been made between citizens of the State of Connecticut and there had been no state lien for the furnishing of repairs at the yard of the libellant no proceeding *in rem* for the amount of said supplies could have been maintained. The Statute of 1910, however, includes any vessel whether foreign or domestic, and under the Federal statute the libellant had a lien against the schooner "Francis McDonald". The only evidence in the record as to the residence of the claimants will be found on Page 6, fol. 13, of the record, where it is stated that the bills were rendered, as the work progressed, to A. D. Cummins & Co., of Philadelphia. If the "Francis McDonald" at the time she arrived at the libellant's yard at New London was a vessel the statute gives a lien for the services and material furnished to the schooner. It may be claimed that the "Francis McDonald" was not legally in existence as a vessel or ship until she had been documented, but such a claim if made is set at rest by the decision of this court in *Tnucker* v. *Alexandroff, supra*:

"A merchant vessel, built for the purpose "of trade and commerce, is a merchant ves- "sel, though she might not yet have received "her registry—a formality only necessary to "entitle her to the privileges of an American "vessel." (Bottom of page 445.)

It is respectfully submitted that the decree should be reversed.

SAMUEL PARK,
HENRY E. MATTISON,
Counsel for Libellant-Appellant.

Supreme Court of the United States

October Term, 1919

No. [redacted]97

THE THAMES TOWBOAT COMPANY,
Libellant-Appellant,

against

THE SCHOONER "FRANCIS MCDONALD," her tackle, &c.,

ALBERT D. CUMMINS,
Claimant.

Brief of Claimant Appellee

MARK ASH,
PETER ALEXANDER,
For Claimant-Appellee.

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Claimant.

BRIEF OF CLAIMANT-APPELLEE.

Statement of Case.

This appeal in admiralty is brought up by the libellant to this Court upon a certificate as to question of jurisdiction (Record, p. 18), made by Charles M. Hough, Circuit Judge, holding the U. S. District Court for the Southern District of New York, which by final decree (Rec., p. 15) dismissed the libel for lack of jurisdiction.

The question of jurisdiction is: Has admiralty jurisdiction of a contract made after a vessel is launched for work done and materials furnished in the construction of the vessel.

The libellant, while conceding the general principle of want of jurisdiction of admiralty to entertain a suit upon a contract for work done and materials furnished towards the building of a vessel, urges that this principle does not apply

to a contract made after the hull is launched, for labor and materials necessary to continue and finish the construction into a completed vessel as originally designed, to fit her for commerce and navigation.

Statement of Facts.

The building of the vessel in controversy was started at Groton, Conn., under contract with the claimants by the Robert Palmer Shipbuilding & Marine Railways Co. and its successor the Groton Iron Works. After construction had progressed so far as to permit the hull to be launched, the builders owing to work in hand for the U. S. Government, found they could not complete the contract, and it was agreed that the claimants should take the hull elsewhere together with the materials which had been assembled to finish the vessel, a certain amount being allowed off the contract price (Rec., p. 2, fol. 6, 7, p. 9).

Accordingly, as the vessel was not in shape to move her very far (Rec., p. 9, fol. 20) the claimants went to the shipyard nearby of the Thames Towboat Company at New London, Conn., and made arrangements to complete the building—"finish construction work, for new construction work," to use the words of libellants' witness (Rec., p. 7, fol. 16).

What was brought to New London was merely an unnamed unfinished hull.

Capt. Thompson, superintendent of construction from the start (Rec., p. 12, fol. 24) states that "she was not a vessel . . . she was simply off the ways" and "was not fit to go anywhere" (Rec., p. 12, fol. 25). . . . "She had no steer-

ing gear," although "her rudder was shipped; that was all. She had no chain plates on; they were all laying on deck, and the bolts and beams and gaff were all laying on deck; the decking was on deck, to building the forward house with; that was not built; the hawse pipes were not in, they were on deck. . . . The lower mast was simply stepped. . . . It was temporarily wedged with oak wedges. . . . The lower rigging was over the lead of the lower mast, but all the rest was down in the hold" (Rec., p. 12, fol. 26). He further says that "the masts were simply standing on their steps; had to be wedged up to keep them firmer; the chain plates had to be put on the vessel and the rigging attached" (Rec., p. 12, fol. 26); the vessel was not "in any condition to carry on any service at that time" (Rec., p. 12, bottom).

Cummins, one of the claimants, corroborates Thompson as to what was the condition of the hull (Rec., p. 12, fols. 20, 21, 22; p. 10, fol. 21).

That the building of the vessel was far from completion is further evidenced by the fact that the Thames Towboat Company was at work in the construction from October 27th, to December 12th, 1917 (Rec., p. 6, fol. 13), for which the charge was $8,574.95 (Rec., p. 1, fol. 1), and then the vessel was taken to Tietjen & Langs yard where it took 30 or 40 days more to complete her (Rec., p. 10, fol. 21).

In the light of this proof, which is not disputed, our adversary is in error in the conclusion (Brief, p. 17) that the hull was brought to the yard of the libellant "simply for the purpose of finishing up the odd jobs upon her." It is

further a mistake to argue (Brief, p. 17) that what libellant did was not in the work of construction because before that work was begun, the vessel "was capable in that stage of his construction to carry cargo if she had been designed to carry cargo without sail." The evidence establishes the contrary, as we have above shown, that the hull's deck was not yet built, she had not been caulked and was far from finished to be used as a barge without motive power. Moreover, in determining whether the vessel's construction was virtually completed when libellant took hold of her, the test is not whether she was then able to engage in business "if she had been designed to carry cargo without sail." She was designed, as the libellant knew, as a schooner with sails and equipment to engage in commerce and navigation, and libellant undertook to continue and complete her construction *as such*. As well it might be claimed, that the finishing of the hull of a steamer, after she was put overboard, installing her engines, boiler and machinery and completing her superstructure—always done after launching—were not construction work, because the hull could possibly be used without motive power to carry cargo.

The true condition is as stated by Judge Hough (p. 14, fol. 30):

> "All the work done and all the material furnished by this libellant were for the purpose of completing the construction of the schooner McDonald, *so that she would be as a schooner and not as a mere hulk able to plough the sea*" (Italics ours).

ARGUMENT.

I.

Admiralty has no jurisdiction to enforce a contract for work or materials entering into the construction of a new vessel, although the contract for the same was made after the vessel was launched.

Whatever conflict may have existed previously, it was definitely settled by this Court in

Peoples Ferry Co. v. *Beers*, 20 How 393,

that the District Courts of the United States have no jurisdiction in admiralty over contracts for the building of vessels. That case has been consistently followed by this Court (*Roach* v. *Chapman*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532; *The Winnebago*, 205 U. S. 354; *Tucker* v. *Alexandroff*, 183 U. S. 424; *Northern Pac. S. S. Co.* v. *Hall Bros. Marine Co.*, 249 U. S. 119) and in the lower courts (*The Pacific*, 9 Fed. 120. *The Count de Lesseps*, 17 Id. 460; *The Glenmont*, 32 Id. 703 and 34 Id. 403; *The Paradox*, 61 Id. 860; *The William Windom*, 73 Id. 496; *McMaster* v. *One Dredge*, 95 Id. 832; *Pacific Surety Co.* v. *Leatham & S. Tow. & Wreck. Co.*, 151 Id. 440, 442; *The United Shores*, 193 Id. 552; *The Dredge A*, 217 Id. 617).

As we have already stated, our adversary does not dispute (Brief, p. 6) this general principle "that a contract for the construction of a vessel is in its nature non-maritime and is not a sub-

ject for admiralty jurisdiction." But it is urged that there is a "broad distinction," which gives the admiralty jurisdiction where the work and materials are furnished under a contract made *after* the vessel "has been launched and is water borne" (Brief, p. 7).

This distinction fails to find support in ruling authorities defining the admiralty jurisdiction and it ignores the vital difference which is fundamental in admiralty jurisdiction arising *ex contractu* as distinguished from that arising *ex delicto*.

It is common knowledge recognized by the courts that usually a part of the structure of the future ship is built on the stocks. There in wood construction, the keel is laid, the frame fashioned from the timbers and the planking and ceiling put on. Then the hull is launched overboard and the larger portion of the construction is continued. The superstructure is proceeded with, the masts and booms installed, the rigging put up, the sails fitted and bent and the many other things provided required for her equipment as a completed vessel to engage in the commerce for which she is destined. If the vessel is built to be propelled by steam, her boilers, engines and machinery are generally placed in the hull after it is launched and before the superstructure is begun. There is no room in shipyards to provide ways for vessels until their construction is complete. To do so, would increase the cost of shipbuilding uselessly.

Our adversary, in stressing that libellant's work and materials were furnished after the hull

"had been launched and is water-borne" (Brief, p. 10) mistakenly rests his cause of action upon the jurisdiction in admiralty in cases of tort instead of its jurisdiction in cases of contract. The difference is elementary and fundamental.

> "The jurisdiction of courts of admiralty in the matters of contract, depends upon the nature and character of the contract, but in torts, it depends entirely on locality." Grief, J., in *Phila. W. & B. R. R. Co.* v. *Phila. & H. St. Towbt. Co.*, 23 How. 209, 215.
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> The admiralty jurisdiction in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Catron, J., in *People's Ferry Co.* v. *Beers*, 20 How. 390.
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> "'Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality.'" Clifford, J., in *The Belfast*, 7 Wall. 624.

Touching admiralty jurisdiction:

> "As to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime

> contract, having reference to maritime service or maritime transactions." Bradley, J., in *Insurance Co.* v. *Dunham*, 11 Wall. 1, 26, quoted with approval by Hughes, J., in *Atlantic Transport Co.* v. *Imbrovcek*, 234 U. S. 52.
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> "It must be taken to be the settled law of this Court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality, whether the act was committed upon navigable waters, in matter of contract it depends upon the subject matter, the nature and character of the contract, and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed, upon the navigable waters, is inadmissible; the true criterion being the nature of the contract as to whether it have reference to maritime service or maritime transactions." Pitney, J., in *North Pac. S. S. Co.* v. *Hall Bros. Marine Ry. & S. Co.*, 249 U. S. 119, 125.

It would be presumptuous on our part, at this late day to argue either as an original question, or make excerpts from the many authorities in this court or in the lower Federal courts in support of the principle, that a contract to build a ship is not a maritime contract, and therefore admiralty has no jurisdiction to enforce it. The principle is too firmly established to be discussed *de novo* despite the contrary view of the distinguished judge, who tried this case below (Rec., p. 13, bot., and p. 14).

As late as 1907, this court in *The Winnebago*, 205 U. S. 354, 363, said (per Day, J.):

> "Finally, an elaborate and able argument is made in support of the contention that a

> contract to build a ship is a maritime contract, and therefore can be enforced only in admiralty; but, as late as this term, in *Graham & M. Transp. Co.* v. *Craig Shipbuilding Co.*, this contention was overruled upon the authority of the previous decisions of this court. 203 U. S. 577."

A single pertinent extract from the opinion of this Court written by Mr. Justice Clifford in *Edwards* v. *Elliot*, 21 Wall 532. elucidating why a contract to build a ship is non-maritime, may be permitted, viz.:

> "Shipbuilding is an occupation requiring experience and skill and, as ordinarily conducted, is an employment on land, as much as any other mechanical employment, and men engage in the business for a livelihood just as they do in other mechanical pursuits and for the same purpose. Shipwrights, unlike the seamen, have their homes on the land, and not on the seas, and they are seldom ship-owners, and not more frequently interested in commerce and navigation than other mechanics. Ships are bought and sold in the market just as ship timber, engines, anchors or chronometers are bought and sold, even before they are fully constructed and before they are equipped for navigation, and no reason is perceived why a contract to build a ship, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or propel the ship, should be regarded as maritime."

With the exception of the three early cases (*Eliza Ladd*, Fed. Cases No. 4364, *The Revenue*

Cutter, Fed. Cases No. 11714, both decided in 1875 and 1877 by Deady, D. J., and *The Manhattan*, 46 Fed. 797, decided on 1891, by Hanford, D. J.), relied on by our adversary, in no case in this court or in the lower courts, which we have been able after search to discover, has the distinction been made between contracts for work and materials in the building of the vessel towards her completion furnished *after* the hull was launched, and like contracts for work and materials furnished *before*. Each contract has been held equally non-maritime.

These three cases have on the other hand been expressly or in effect disapproved by many later authorities, to which we shall refer.

Nor have we been able to find any authority subsequent to the *Eliza Ladd, supra*, to sustain the position taken by our adversary (brief, p. 7) that what was the partially constructed hull in this case before launching became a vessel *in esse* after launching. On the contrary there are authorities, which hold that a hull is not a vessel.

Northup v. *The Pilot*, 6 Or. 297,
Srodes v. *The Collier*, Fed. Case No. 13272,
The Dredge A, 217 Fed. 617, 630.

In the last cited case, Connor, D. J., said:

> "It is manifest that the entity, or thing, which Mitchell purposed bringing into existence, was entirely distinct from the hull which constituted the original element in the new structure. . . .
>
> It makes no difference that the vessel was in the water. It is always the case that a

portion of the construction of a vessel is after she has been put in the water. It clearly appears that the vessel was not so far completed at the time as to enable her to discharge the function for which she was intended."

The *William Windom* (D. C.), 73 Fed. 496, decided in 1896, contains so lucid a discussion of the precise point under discussion that we take the liberty of quoting from it *in extenso*, particularly as it refers to *The Eliza Ladd, supra*. In the Windom case, after the hull of a steel propellor had been sufficiently completed, it was launched. Thereafter, one Marmann, at the owners' request, performed machinist's work in completing the equipment. A libel in admiralty to recover for the work done, was dismissed upon exceptions, for want of jurisdiction by Shiras, D. J., who referring to the decision of Deady, D. J., in the *Eliza Ladd, supra*, said:

"The learned judge bases his reasoning in that case largely upon the assumption 'that by the general maritime law of the civilized world a contract to build a ship is a maritime contract, because it has relation to a ship as the agent or vehicle of commerce upon a navigable water.' In *Edwards* v. *Elliott*, 21 Wall. 532-554, the Supreme Court expressly holds that, while this was the rule under the civil law, it had never been adopted as the rule in England or in this country, but, on the contrary, since the decision of the Supreme Court in the cases of The Jefferson (*Ferry Co.* v. *Beers*), 20 How. 393, and *Roach* v. *Chapman*, 22 How. 129, the settled rule is that a contract for the original

construction of a ship, or for furnishing the materials in aid thereof, is not a maritime contract. It would also seem that Judge Deady has been misled in his conclusion by attaching too much importance to the expression used by the Supreme Court in *Ferry Co.* v. *Beers*, 20 How. 393, that a contract for the building of a ship or boat "is a contract made on land, to be performed on land." The true test is not whether the parties, when the contract was made, happened to be on the land or on the water, nor whether the vessel was on the land or in the water when the work was done. In the case of torts the jurisdiction depends on the matter of locality, but in the case of contracts it does not. Thus, in Philadelphia, *W. & B. R. R. Co.* v. *Philadelphia & H. Steam Towboat Co.*, 23 How. 209, 215, it is said: "The jurisdiction of courts of admiralty in the matters of contract depends upon the nature and character of the contract, but in torts, it depends entirely on locality." The test given for determining whether a given contract is or is not maritime in its nature is the question whether it pertains to rights and duties belonging to the commerce and navigation that are under the control of the national government, including contracts for furnishing repairs and supplies for vessels engaged in such commerce and navigation. The doctrine of the Supreme Court is that, while a boat or vessel is being originally built it is not connected with commerce and navigation in such sense that contracts made for the building the boat, in whole or in part, or for furnishing the labor or materials, can be said to be connected with or have reference to commerce or navigation. Such contracts may be entirely completed, the vessel

may be wholly built, and yet may never be used in connection with commerce or navigation. A contract to be of a maritime nature, must be connected with or in aid of commerce or navigation. Merely because it is connected with a ship does not make it maritime. Hence the Supreme Court holds that contracts connected with the original building and equipping of a ship or boat cannot be held to be of a maritime nature, because they are not, in any proper sense, connected with commerce and navigation. Under the doctrine and rule thus given by the Supreme Court, it must be held in this case that the contract under which the libellant performed the labor for which he seeks to recover, is not of a maritime nature, because the labor performed was in connection with the original construction of the boat, and the Windom, when the labor was done, had not become engaged in any commerce or navigation; and therefore, if the libellant had a lien under the provisions of the state statute, it was not of such a nature that a court of admiralty could take jurisdiction thereof, but it could only be enforced by a proceeding in the state court. The exceptions to the libel on the ground of lack of jurisdiction in this Court must therefore be sustained, and the libel must be dismissed." Followed in *Pacific Surety Co. v. L. & S. Tow. & Wreck. Co.* (7 C. C. A.), 151 Fed. 440, 442, in which it is said "The fact that the vessel is launched does not make the contract therefor, maritime."

The Paradox, 61 Fed. 860, is another case which seems on all fours with this case. There the original contract for the machinery of a vessel was made before she was launched. After the hull,

constructed by other persons, was sufficiently advanced and launched, it was towed to the contractor's yard and the latter proceeded with installation of the machinery prepared under the contract. While this work was going forward the original contractor, for some reason not disclosed in the opinion, gave up the contract and the libellant, who succeeded him, took up and finished what the former had left undone, including certain changes in detail made as the work progressed.

Judge Addison Brown, an eminent admiralty judge, in dismissing the libel, after consideration of the authorities, said (p. 861):

> "If the supply of machinery is to be deemed a part of the building of the vessel, the contract, by the settled law of the country is not a maritime contract and cannot be enforced in this Court. . . . The evidence leaves no doubt that all the machinery was contracted for and supplied for the purpose of completing the construction of the vessel as an experimental yacht, in accordance with the original design. The libellant's officers understood this from the beginning. (Cf. Rec. p. 7 f. 16, where it appears from the testimony of libellant's witness that it understood that what it was to do in this case was 'to finish construction work, for new construction work.') . . . When the vessel is completed for the purpose intended, then the vessel is built and not till then, whether it be a steamer, a sail vessel, a barge, a scow or a mere float, designed to support and transport a bath house (*The Bath No. 2*, 61 Fed. 632), and whatever is supplied to such a vessel for the purpose of making it what it is intended to be and to enable it to enter upon

> the kind of business or navigation intended, is part of the building of the vessel. This is the clear weight of authority. The case seems to me to be entirely within the decision of *Roche* vs. *Chapman*, 22 How. 29; *In re Glenmont*, 32 Fed. 703; *The Pioneer*, 30 Fed. 296; *The Insco*, 1 Brown's Adm. 495, Fed. Cas. 7060; *Wilson* vs. *Lawrence*, 82 N. Y. 469, in which cases all the suggestions and arguments of libellant seem to me to be met and overruled."

The learned counsel for appellant attempts (brief, p. 7) to distinguish the Paradox by quoting from a brief of Robert D. Benedict, filed in her behalf, in which it is said that the Paradox two days after her launching went to libellant's yard and found the engines practically completed, which shows that the contract for the engines had been made long previous to the launching of the Paradox. This conclusion upon which our adversary relies is not supported by the facts as set forth in the decision, as we read it. It therein appears (61 Fed. at p. 861) that the original contract for the machinery was made with another preceding company before the vessel was launched, and the libellant succeeding company *took up and finished what the former left undone*, and it further appears that after the launching in libellant's yard, the machinery was there *put in by the libellant company and by the preceding company.*

In view of these facts, it does not necessarily follow that the contract with the libellant company to take up and finish what the preceding company left undone, was made before the vessel

was launched. But on the contrary, the more reasonable conclusion is that the preceding company having fallen down after the engines had been practically completed, the libellant company was called in to help install the engines into the yacht, and make changes in the detail to increase the efficiency of the machinery (61 Fed. at p. 861), and that the contract therefor was made after the yacht was launched. This seems to have been the view of the learned Judge, who decided the instant case, sitting in the same court which decided the Paradox, with the record available in that suit. He said (Rec., p. 14):

> "But it is difficult to distinguished this case or that of the Paradox from the earlier cases in the Supreme Court and it is impossible to suggest any substantial distinctions between the present litigation and Judge Brown's decision in the Paradox, which in my judgment, is binding upon me."

In *The Winnebago*, 205 U. S. 354, the question of jurisdiction involved here came up to this court on writ of error from the Supreme Court of Michigan, 142 Mich. 84, allowing a state lien against a vessel for materials furnished in the construction of a vessel both before and after she was launched. Our adversary is mistaken in stating that the contract for these materials was made before her launching (brief, p. 12). Upon reference to the decision in the State Court, 142 Mich., at p. 89, it appears that of the materials furnished by the complainant Delaney Forge Co.:

> "all but four items were furnished before the date of the launching, March 21, 1903, and

> that these four items, one quadrant, three steel valve stems, three steel connecting rod caps, and one tiller, were furnished April 30, and July 16, 1903";

and on p. 87, it appears

> "that the materials furnished by complainant were steel forgings supplied, according to the specifications and drawings furnished, between November 24, 1902, and July 16, 1903, *as from time to time ordered* by the Columbia Iron Works, upon the purchase price of which, a balance of $1,999.90 is claimed."

from which it clearly appears that some of the materials were ordered after March 21st, 1903, the date of the launching.

This court in dismissing the writ of error and affirming the judgment of the State Court said by Mr. Justice Day (p. 362):

> "It is next objected that the court erred because certain items were allowed for material furnished the vessel after she was launched, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But we agree with the state court that these items were really furnished for the completion of the vessel, and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the state court. *The Isosco,* 1 Brown Adm. 495, Fed. Cas. No. 7060; *The Victorian,* 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040; *The Winnebago,* 73 C. C. A. 295, 141 Fed. 945."

In *The Glenmont,* 32 Fed. 703 (aff'd. 34 Fed. 402), *a month after* the hull of the steamer was

built and the propelling power installed, the libellant furnished her stores, fuel, lines, copper wire, packing for her machinery; pails for her roof, bedding, etc. Judge Nelson in deciding the case said (p. 704):

> "The hull of the steamboat was built and the propelling power put in under a contract as I understand the evidence, a month or more before the materials for which a maritime lien is claimed, were furnished. The terms of the construction contract were not disclosed, but the original contract did not include the materials and outfit, a lien for which is now asserted. . . .
>
> I cannot doubt that the materials furnished were necessary according to the original design and the steamboat would not be suitable for the navigation intended without the tiller rope, check line, bedding, etc., included in libellant's bill of items. The original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and no maritime lien exists."

The affirmance was by Brewer, C. J. (who afterwards sat in this Court).

In *The Pacific* (D. C.), 9 Fed. 120, the report shows that Pardessus & Anthony, residents of New York City, commenced the building of a steam dredge at Astoria, in the Harbor of New York. Her hull was there completed and at the end of April, it was launched and towed to Greenpoint, Kings County, New York, a place near Brooklyn. From the statement preceding the opinion (pp. 120, 121) it appears that between the time of launching in April and the following Sep-

tember, a great number of claims were contracted for labor, provisions, bolts, nails, iron work, anchors, ropes, chains and articles of a similar nature which went into her original construction and equipment, and also a bucket or scoop to be used in excavating material by the dredge. On or about September 24th, she was towed to Norfolk, where she met with reverses and suits were brought in admiralty against her on these various claims. The libels were dismissed for want of jurisdiction by Hughes, D. J., who, referring to *The Peoples Ferry Co.* vs. *Beers* and *Roach* vs. *Chapman, supra*, decided by this Court, said (p. 125):

> "I think that the foregoing propositions settle all the claims in this case. They are all for materials, engines, machinery, work or supplies furnished the original owners of the dredge in its original construction and equipment. As such they come within the ruling of the Supreme Court in the case of *Roche* vs. *Chapman*. The claims are not maritime because they are for original construction and equipment."

In *McMaster* v. *One Dredge* (D. C.), 95 Fed. 832, the facts are virtually the same as in the last cited case. Libellant made a contract with the owner of a scow to equip her with a dredging plant, thereby converting her into a dredge, which before that was merely a wood scow or barge. The machinery installed by libellant under his contract and the equipment furnished by him had never been on the scow, but were a necessary part of the equipment and appliances required for her conversion into a dredge. A libel brought in admiralty to recover the amount due

libellant was dismissed for want of jurisdiction, Bellinger, D. J., writing:

> "It can make no difference whether the scow was already built and had therefore been used for another purpose, or whether it was newly constructed for the purpose of a dredge. As a mere wood barge, the things done were not required. It was only for the purpose of a dredge, which in its relation with the scow was a new thing, that the work and labor in this case were performed and the material furnished and this is a building of the dredge within the rule adopted in the cases cited. What was done and supplied in this case was for the purpose of making the vessel what it was intended to be, and what it had theretofore not been,a dredge, a thing with which the wood scow as such had no relation. This contract therefore is not a maritime contract."

In *The Count de Lesseps*, 17 Fed. 460, a floating scow having been constructed in New Jersey, was towed to Pennsylvania to have her machinery installed and equipment furnished to complete her as a dredge. The libellant, after she had been launched and brought to Philadelphia, furnished her with a derrick, buckets and other dredging machinery. To a libel brought against the vessel in admiralty to recover the amount due, the owner of the dredge in defense set up that the work and material furnished to the vessel went into her original construction, and for that reason the contract was not maritime.

Butler, D. J., in so holding, said (p. 461):

> "Although there is some inconsistency in the decision of the lower courts, I cannot

doubt that what the libellant did should be held to have been done in the original construction of the vessel, if as before suggested, this structure should be so denominated. The question involved has been so fully considered in cases undistinguishable from this, that further discussion would serve no useful purpose. (*People's Ferry Co.* v. *Beers*, 20 How. 393; *Roach* vs. *Chapman*, 22 How. 129; *Edwards* vs. *Elliott*, 21 Wall. 532; *The Ship Norway*, 3 Ben. 123; *Scull* vs. *Shakespeare*, 25 P. F. Smith, 297; *Morehead* vs. *Enequist*, 23 How. 494; *The Pacific*, 9 Fed. 120.)"

In *The Isosco*, Fed. Cas. 7060, it appeared that a hull of a schooner completed at the place of launching, was towed with her spars on deck, to another port, where her masts were set up and the vessel put in condition for navigation. On this state of facts the Court found:

"Whether the claim of libellants arises out of a maritime contract and whether they have a right of action in this court in rem, depends upon the question of fact, whether what libellant did and furnished were to and for a vessel already in existence and whether they were so done and furnished in part to bring her into existence as a completed thing. If the former, then the action will lie; if the latter, it will not lie, and this Court has no jurisdiction. . . .

Neither is there anything in the position of libellant's advocate that the schooner had to all intents and purposes assumed the position of a vessel by taking in and transporting freight on her trip from Alabaster to Bay City, and therefore what was done and furnished to her at the latter place by libel-

lants must be deemed as repairs, etc. The undisputed testimony is that the flour, etc., were taken as ballast. But if this were otherwise the position could not be maintained because it clearly appears that the vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended, and that the sole purpose of the trip was to avail her owners of the greater facilities of Bay City to complete her construction."

In *The United Shores,* 193 Fed. 552, suit was brought against the vessel to enforce a maritime lien against her for life boats, life rafts, life preservers and releasing hooks. The steamer was launched in June, 1911, and after her launching, a part in June and the remainder early in July, of the articles above mentioned were furnished to her. The owners of the vessel defended on the ground that the Court was without jurisdiction and Hazel, D. J., in dismissing the libel, said (p. 553):

"But I think that such articles were a part of her original equipment and essential to her completion. She was not a fully equipped or completed vessel without them, since her practicability, or at least her right to navigate and carry passengers, required that she be provided with such life-saving apparatus to fit her for her intended purpose. *American & English Encyc. of Law,* vol. 19, p. 1902; *Benedict's Admiralty* (4th Ed.), Sec. 183. Without it she was an incompleted vessel and outside of the admiralty jurisdiction of this Court. *Roach et al.* vs. *Chapman et al.,* 22 How. 129, 16 L. Ed. 294; *Edwards* vs. *Glenmont* (D. C.), 32 Fed. 703. And it is

not of material importance that the supplies were furnished by the libellants subsequent to launching the steamer. *The Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836; *The Paradox* (D. C.), 61 Fed. 860. * * * (P. 554): The facts of the present case do not disclose a maritime lien for the articles furnished by libellants, and therefore the libel is dismissed."

In *The Dredge A*, 217 Fed. 617, a late case, the question under discussion was again examined in the light of precedent.

It appears from the report, that one Edward H. Mitchell, who had a contract with the government for dredging around the ports of Oriental, Morehead City and Beaufort, N. C., bought an old scow and brought it to Philadelphia to be converted into a hydraulic dredge. At the latter place, engines, boilers and suitable machinery were made and installed in the vessel, between December 10th, 1910, and May 11th, 1911, at which time she was finally completed and sent to North Carolina to operate under the contract. A great number of contractual claims of various kinds arose in converting the hull into a dredge, and, not being paid, libels in admiralty were brought against her, she was sold and her proceeds paid into court.

It will be noted that before changing the scow into a dredge was begun, the vessel was afloat and subject to the admiralty jurisdiction, and according to the contention of appellant, the court should have entertained jurisdiction. Connor, D. J., however, decided after a renewed examina-

tion of the authorities, against the jurisdiction. He said (p. 631):

> "If we substitute the word 'hull' as described by the master, for the 'scow' the language describing the condition existing in regard to Dredge A at Philadelphia prior to May 11, 1911, the result must be the same as arrived at by the Court. *The Rapid Transit* (D. C.), 11 Fed. 322. It was then and not till then that the dredge became a maritime entity and within the admiralty jurisdiction; it was then that she became a completed dredge and subject to be repaired and supplied to enable her to perform the work for which she was constructed. • • • (p. 632): These claims are clearly within the letter and spirit of the language of Justice Clifford in *Edward* vs. *Elliott*, 21 Wall. 532, 22 L. Ed. 487, in which after a discussion of the earlier cases he says 'convinced or not, every candid inquirer must admit that this Court did decide in that case (*Peoples Ferry Co.* vs. *Beers*, 20 How. 393, 15 L. Ed. 961) that neither a contract to build a ship, nor to furnish materials for the purpose, is a maritime contract' and dismissed the libels on the ground that the Court was without jurisdiction to entertain and enforce them."

The question of jurisdiction under consideration has been passed upon by state courts under their statutes giving liens for claims arising out of the construction of vessels, in which it was urged in defense that the claims being maritime, jurisdiction was exclusive in admiralty in the Federal Courts. A leading authority is *Wilson* vs. *Lawrence*, 82 N. Y. 409. In this case it appears that in the summer of 1877, one Beach was engaged

in the construction of a schooner called the *La Ninfa* at Port Jefferson, Long Island, and on September 18th, she was launched without sails and incomplete in other respects. On the 2nd of October, subsequent to her launching, Beach made a contract with the plaintiff to furnish new sails for the vessel and while they were being made, the vessel was drawn out of the water again and put on the ways to be finished. Suit was brought in the State Court to enforce a lien under the provisions of Chapter 482 of the Laws of New York of 1862, and the owner defended on the ground that the claim for furnishing the sails was a maritime claim and not within the provisions of the state statute.

Judge Finch of the N. Y. Court of Appeals in deciding to the contrary said (p. 411):

> "The authorities are very clear that an agreement for the building and construction of a vessel is not maritime. (*Peoples Ferry Co.* v. *Beers*, 20 How. (U. S.) 402; *Roach* v. *Chapman*, 22 How. 129; *Morewood* v. *Enequist*, 23 *id.* 491; *Edwards* v. *Elliott*, 21 Wall. 532; *Cunningham* v. *Hall*, 1 Cliff. 46; *Young* v. *The Orphans*, 2 *id.* 29.) The learned counsel for the appellant does not deny that the rule as stated is finally settled, but opposes the lien with the argument that the furnishing of sails after launching is not a contract, which relates to the building or construction of a vessel, and cites the decisions of our own State as authority for the distinction. (*Sheppard* v. *Steele*, 43 N. Y. 52; *Brookman* v. *Hamill*, *id.* 554; *Happy* v. *Mosher*, 48 N. Y. 133; *King* v. *Greenway*, 71 *id.* 417.) In the discussion of these cases the several contracts were spoken of as made respecting

a vessel 'before launching; while yet on the ways'; while 'unfinished on the ways'; when 'not launched.' But these expressions were used because in those cases such was the fact, and not with any view of declaring a rule that after launching every contract relating to a vessel is purely maritime. It is doubtless true that before launching the contracts for construction are more easily and strongly shown to be land contracts but no case holds that the work of building or constructing a vessel cannot proceed after the launch. Indeed no case could hold that, for it is purely a question of fact. A vessel may be unfinished when launched, and the work of building may continue while she is in the water. The question in this case, therefore, is, did it so continue, and was the contract for sails one relating to the building of the vessel? There is evidence that, after the launch, work continued upon the schooner; that she was drawn out of the water and put again upon the ways and while there caulked, painted and fastened; and the sails in question furnished to her. It is further shown that she was a sailing vessel; that the sails were furnished to complete her building, and were a part of her construction. Based upon this evidence the court below found as a fact that the owner of the schooner had contracted a debt to the plaintiffs for certain sails, material, and labor for or toward the building of said vessel. The finding was warranted by the evidence, and settles the fact for the purposes of this appeal."

From this review of the authorities, we submit that these principles relating to the matter in controversy, are settled beyond dispute, viz.:

Jurisdiction in admiralty *ex contractu* attaches only to such contracts which are immediately connected with or in aid of commerce or navigation.

Original building or equipping of a vessel is not of a maritime nature as it is not, in any legal sense, connected with commerce and navigation, which can only occur after the vessel is completed and equipped in commission.

The mere circumstance that a part of the work in the building of a vessel is done *after* she has been put in the water instead of *before* does not make a contract for that part maritime and give jurisdiction in admiralty. Both are treated alike as construction in the work of bringing the vessel to completion as originally designed to fit her to engage in commerce and navigation.

Our adversary virtually rests his case upon *Tucker* v. *Alexandroff*, 183 U. S., 424, and *Northern Pac. S. S. Co.* v. *Hall Bros. Marine Co.*, 249 U. S. 119. But nothing was decided in either of these cases, which impugns the authority of the earlier cases in this court and the lower federal courts, to which we have referred, in support of the doctrine that the claim of the libellant is not within admiralty jurisdiction.

What Mr. Justice Brown said in *Tucker* v. *Alexandroff* (183 U. S. 424, 437) as extracted in the brief of our adversary (pp. 10-12) was clearly not intended to overrule any of these previous decisions of this court and of the lower federal courts, to the effect that work done in the construction of a vessel whether before or after the hull is

launched, is not the subject of admiralty jurisdiction.

This appears from the following part of his opinion, which is not extracted in our opponent's brief (183 U. S. 438):

> "In *People's Ferry Co.* v. *Beers*, 20 How. 393, 15 L. ed. 961, it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construction of a vessel; while the cases holding that for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation."

It will be noted that in this extract, the learned Justice cites the leading case of *People's Ferry Co.* v. *Beers* as holding that admiralty jurisdiction does not cover "work done and materials used in the construction of a vessel." In what follows as to admiralty jurisdiction for repairs or alterations, supplies or materials furnished after she (the vessel) is launched, he uses the word "launched" in the sense of "completed." Obviously in the latter sense, a vessel may be the subject of admiralty jurisdiction for "repairs or alterations, supplies or materials."

That this is the proper sense in which the word "launched" was used, would seem to follow from the decision in *Northern Pac. S. S. Co.* v. *Hall Bros. Marine Co.*, *supra*, in which Mr. Justice Pitney says (249 U. S. at p. 127):

> "That the true basis for the distinction between the construction and repair of a ship, for the purposes of the admiralty jurisdic-

> tion, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is *completed and launched.*"

and in support of this statement quotes the language of Mr. Justice Brown in *Tucker* v. *Alexandroff*, 183 U. S. 424, at p. 438. The conjunction of "completed" with "launched" is significant.

The view we have taken in this respect is shared by Robert M. Hughes (an expert in admiralty law, author of *Hughes on Admiralty*), in his article on maritime liens in 26 Cyc. 743-763, in which he considers the difference between construction and repairs as affected by launching. In a note (26 Cyc. 763) he collects and reviews the various cases in this court and in the lower courts, including *Roach* v. *Chapman*, 22 How. 129, to show that work done after a vessel is launched is construction work. He says:

> "This decision ought therefore to be conclusive and would be but for the recent case of *Tucker* vs. *Alexandroff*, 183 U. S. 424, 438. In that case, however, Judge Brown says: 'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property. * * * In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction.' The case involved the question whether a Russian sent out as part of the crew of the Varing could be reclaimed by his government, he having deserted while the ship was still incomplete. The court held that his government could have him appre-

> hended, the main part of the opinion being devoted to the international question at issue. No point was involved as to the character of work done upon a ship; and in view of the facts before the Court in the two older cases, as explained above, it is difficult to believe that the court intended to change the rule established by them; for they both treated as construction some work at least which was done afer launching."

Evidently in accordance with these views Hough, C. J., said in his opinion (Rec., p. 14):

> "As for the language in *Tucker* v. *Alexandroff*, 183 U. S. 424, it must be taken in connection with the sentence on page 439, viz.: 'Inasmuch as the Variag had been launched and was lying in the stream at the time of Alexandroff's desertion, we think that she was a ship within the meaning of the treaty.' That was the only point that was decided in the Tucker case; all the rest is obiter unless read in connection with and understood by the point of decision."

Nor is *The Northern Pacific S. S. Co.* v. *Hall Bros. Marine Co.*, 249, U. S. 119, an authority in support of the admiralty jurisdiction in the instant case. The extract from the decision in our adversary's brief (pp. 13, 14) is misleading unless read in connection with the remainder of the opinion, and in the light of the question presented for determination, i. e., whether a claim for the use of a marine railway on land in the *repair* of a vessel which had been wrecked, was within the jurisdiction of admiralty.

In this aspect, the only reasonable deduction from what Mr. Justice Pitney said, taking the opinion as an entirety, is that during the work of construction, the vessel, whether on land or afloat, is not within the cognizance of the admiralty, for he says the structure must not only be launched but must also be completed before she becomes a ship in the legal sense. On the other hand, after completion, any work done on a vessel whether on land, e. g., a marine railway or on the water, is cognizable in admiralty. This is in harmony with the decisions already referred to, holding that a structure is not a vessel until she has been completed as originally designed, ready to enter upon her career in plowing the seas as an instrument of commerce and navigation, and then only does she become able to enter into contracts which are in their nature maritime and subject to the jurisdiction of the admiralty courts.

Hough, C. J., rightly concludes (Rec., p. 14, fol. 30):

> "So far as I can discover, all the cases on this subject have been collated either in 26 Cyc., page 763, or in The Dredge A, 217 F. R. 617. With few exceptions they all rest upon the basis that construction or building means fabrication for the originally designed purpose; so that everyone who contributes (at least knowingly) to such intended fabrication is a builder and not a furnisher of supplies, material or labor."

It is hard to conceive that this Court in the expressions used by it in the two recent cases above referred to, intended to overrule its prior

decisions and to change the law as it has existed for so many years and had been interpreted by so many of our Admiralty Judges.

II.

The work and materials were furnished by libellant in furtherance of the construction of the vessel, and no lien is given therefor under the Act of Congress of June 23, 1910, which relates only to liens for "repairs, supplies or other necessaries."

The act referred to (Ch. 373, 36 Stat. 604, Ann. U. S. Comp. Stat. 1916, Sec. 7783), is reprinted on appellant's brief, page 16.

The position of our adversary under Point II of the Brief is founded upon the mistaken basis that what the libellant did was "simply for the purpose of finishing up the odd jobs upon her" (Brief, p. 16). What was done by libellant as we have shown and need not repeat (This Brief, pp. 2, 3), extended over a period of nearly two months at a cost of nearly $9,000 and when the hull was towed to libellant's yard, she was so far from complete that she was not "in any condition to carry on any service at that time" (Rec., p. 12, bottom).

If this Court agrees with us in our contention under Point I of this brief, that what was done by the libellant was towards the construction of the vessel to completion, then its claim cannot be brought within the Act of Congress referred to.

That statute gives a lien to one furnishing "repairs, supplies or other necessaries." Libellant's

demand does not come within the term "repairs." As was said by this court so recently in the case of *Northern Pac. S. S. Co.* v. *Hall Bros. Marine Co.* (249 U. S. at p. 127), to which we have hereinbefore referred to, "the true basis for the distinction between the construction and repair of a ship for the purposes of admiralty jurisdiction, is to be found in the fact that the structure does not become a ship in the legal sense until it is *completed and launched.*"

Our adversary, of course, cannot claim that the work done and materials furnished which became a component part of the structure come within the term "supplies" in the statute, and the term "or other necessaries," has been construed to mean "other like necessaries" of the general nature of repairs and supplies, as are fit and proper for the use of a ship.

The J. Doherty, 207 Fed. 997, 1000.
The Dredge A, 217 Fed. 617, 628.

The Act of Congress of 1910, as is well known, was passed to remedy a particular evil previously existing. This is pointed out by the Special master in *New York Trust Co.* v. *Bermuda-Atlantic S. S. Co.*, 221 Fed. 989, 996. The statute did not change the general maritime law or the jurisdiction in admiralty except insofar as it abolished the distinction between "foreign" and "domestic" vessels, and gave alike on both a lien for repairs, supplies or other necessaries, provided the same was based on a maritime contract.

The Sinaloa, 209 Fed. 287, 288.
The Dredge A, 217 Fed. 617, 628.

In *The Sinaloa*, it is said (209 Fed. 288):

> "The purpose [of the statute] does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had always been recognized as cognizable in admiralty.

The presumption is that Congress did not intend to change the general maritime law beyond what it did in abolishing the distinction between liens on "foreign" and domestic vessels.

> "'No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express." Strong, J., in *Shaw* v. *Railroad Company*, 101 U. S. 557.
>
> "We must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." White, J., in *Texas Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437.

Respectfully submitted,

MARK ASH,
PETER ALEXANDER,
Of Counsel for Appellee.

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